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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH ENRIQUE LOPEZ,

Defendant and Appellant.

F056776

(Super. Ct. No. F06906977)

**OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Gary Orozco, Judge.

Deborah L. Hawkins, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and John G. McLean, Deputy Attorneys General, for Defendant and Respondent.

-ooOoo-

Appellant Jose Enrique Lopez, Michelle Molina, Rodger Alley, and Elbert Vargas (collectively, the defendants) were charged with the murder (Pen. Code,<sup>1</sup> § 187; count 1), rape (§ 261, subd. (a)(1); count 2), attempted rape (§§ 664, 261, subd. (a)(1); count 3), and false imprisonment (§ 236, subd. (b); count 4) of Courtney Rice. Following a joint jury trial, appellant was the only defendant to be convicted of first degree murder; Molina was convicted of the lesser offense of involuntary manslaughter, and the jury deadlocked on the murder count as to Alley and Vargas. The jury further found appellant not guilty of rape but guilty of attempted rape and false imprisonment. In addition, the jury found a number of special circumstance and sentence enhancement allegations to be true, including that appellant intentionally killed Rice while he was an active participant in a criminal street gang (§ 190.2, subd. (a)(22)), and that all the offenses were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). Appellant was sentenced, inter alia, to a prison term of life without the possibility of parole. On appeal, appellant contends: (1) the trial court abused its discretion in denying his posttrial motion for disclosure of confidential juror identifying information;<sup>2</sup> (2) the jury instructions were so confusing they violated his due process and fair trial rights; and (3) insufficient evidence supports the gang enhancements and special circumstance. We disagree with appellant's contentions and affirm the judgment.

### **FACTS**

On June 12, 2006, police were called to a tow yard in Fresno where the body of 16-year-old Rice was discovered in the bed of a pickup truck. The decomposing body was found lying face down, wrapped in a sleeping bag, plastic trash bags, and other materials. Rice's feet were handcuffed together and her hands were handcuffed behind her back. Her pants were lowered, exposing her buttocks. There was black electrical

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<sup>1</sup> Further statutory references are to the Penal Code unless otherwise specified.

<sup>2</sup> On November 25, 2008, this court denied appellant's related petition for writ of mandate.

tape tangled in her hair. The chief pathologist of the county coroner's office opined the cause of death was "probable asphyxiation" caused by "binding and gagging."

The subsequent murder investigation uncovered evidence connecting Rice to the defendants, and placing them together during a period between Friday, June 9, and Sunday, June 11, 2006. At trial, the parties stipulated that all the defendants were active members of the Bulldog criminal street gang.

Two other individuals, Sylvester Carter and Maria Coronado, were also linked to the victim. The prosecution's case against the defendants pivoted on the testimony of these two percipient witnesses, who testified pursuant to plea bargains entered on related charges. At trial, Carter admitted he was a member of the Northside Crips, a criminal street gang. Coronado testified she used to associate with the Bulldog gang when she was a teenager and had since had her gang tattoos surgically removed.

Carter testified he went to Molina's apartment on Friday, June 9, 2006, to use drugs; i.e., crack cocaine. When he arrived in the late afternoon, the door to Molina's apartment was partly open. He walked inside and was met by appellant and Molina who told him he "might not want to be here right now, we doing something serious." Thinking they were trying to "party" without them, Carter said "stop playing" and pushed them aside. He then saw Rice lying on the floor in the middle of the hallway. Her hands were handcuffed behind her back and her feet were handcuffed. She was gagged and black electrical tape was wrapped tightly and painfully across her eyes and around her head.

Appellant told Carter, "calm down, this was all right." Appellant explained that Rice had been "running her mouth." Carter understood this to mean Rice had been "snitching" or "talking about [appellant's] ... illegal activities." Appellant asked Carter to kick Rice or do something to show he was "down with the situation." Carter kicked Rice in the small of the back and appellant said, "That's what I'm talking about."

Carter testified that at the time he went to Molina's apartment, he believed appellant, Molina, and Vargas were members of the Bulldog gang. After appellant explained the situation, Carter understood that Rice had been snitching about appellant and that serious things were happening as a result. The environment in the apartment seemed dangerous. Carter agreed that, by testifying at trial, he was also being a snitch and that this placed him in danger in prison. According to Carter, gangs, including the Bulldogs and Northside Crips, had a "green light" on snitches. A snitch's status was worse than that of a rapist or child molester.

After kicking the victim in the hallway, Carter went to join Vargas in the living room, where they got high on crack cocaine appellant gave them. At some point, appellant told Carter and Vargas to "[f]uck [Rice] in the ass" and added that she liked it like that and deserved it. Carter said he would not touch Rice because she was "dirty." Carter explained that "she wasn't in good hygiene care at the time" and her clothes "didn't look too clean."

After Carter made these observations regarding the victim's physical appearance, appellant and Molina ordered Rice to "scoot on her backside towards the bathroom." During this time, Molina acted aggressively towards Rice, calling the victim bad names, making derogatory statements about her appearance, and deriding her for believing she was "going to be with" appellant. In the bathroom, Molina used a key to remove the handcuffs from Rice's hands and feet. Molina then undressed Rice and directed her to sit in the bathtub where she doused Rice with water and shampoo for approximately 10 to 15 minutes.

Afterwards, Molina put the handcuffs back on Rice, who was now naked, and ordered her to scoot back out of the bathroom. Tired of seeing Rice "scooting", Carter picked Rice up by the arms and dragged her into the back bedroom, where he left her on the floor.

According to Carter's testimony, Molina gave condoms to him and Vargas, and appellant gave them crack cocaine. Carter and Vargas then went into the bathroom to toss a coin to determine who would have sex with Rice first. Carter won the coin-toss but told Vargas to go first because he was having difficulty achieving an erection due to his heavy crack cocaine use. Carter remained in the bathroom and tried to get an erection by masturbating. A little later, Carter saw Vargas, shirtless and sweaty, emerge from the back bedroom and walk down the hall towards the living room.

When Carter went into the back bedroom, he found Rice on her knees and elbows with her buttocks up in the air. She was no longer handcuffed, but the tape was still around her eyes. Carter tried but was unable to have sex with the victim due to his continuing lack of an erection. Carter told the victim, if asked, to lie and say they had sex because he was afraid of how the others might react if they found out he did not do his "part of the deal."

Coronado testified that throughout the night she saw the four men going back and forth to the back bedroom and heard them saying things like, "Are you ready, is she ready?" At one point, Alley and appellant were in the back bedroom together. She heard appellant laughing and one of them say, "This is how real gangsters get down."

Carter testified that after he left the back bedroom, he encountered Molina in the hallway. Molina had the key to the handcuffs and instructed Carter to put the handcuffs back on Rice. Carter also handed Molina a condom, which she went and disposed of in the kitchen. A little later, Molina announced: "You guys had your turn, now it's mine." She then walked into the back bedroom and closed the door.

Carter heard Molina yelling at Rice, calling her "a bunch of bitches," and saying "[Appellant] wasn't going to be with her at that time." In response, Rice was "yelling out submissive terms." Carter explained: "[Molina] would yell out, let's say, 'Do you believe [appellant] is gonna be with you?' [¶] And you will hear [Rice] say, 'no.' [¶] 'Are you a fat bitch?' [¶] You hear [Rice], say, 'yes.'"

Carter further testified that it also sounded like Rice was getting hit or kicked. Molina was in the bedroom with Rice for at least an hour. Periodically she would come out of the room looking “exhausted,... like she needed a break, catch her wind.” She would rest for five or six minutes and then go back into the bedroom and shut the door.

Later, appellant and Carter went into the back bedroom with Rice. Appellant handed Carter a rock of cocaine and asked him what they should do with Rice. Carter said he did not know. Meanwhile, appellant used a pellet gun to shoot small, green rubber pellets at Rice, as she was lying handcuffed on the mattress. Rice would grunt when the pellets hit her. In her testimony, Coronado also described seeing appellant shoot Rice with the pellet gun and Rice flinch when the green pellets hit her.

Carter testified that around daybreak he went out on the balcony/stairwell with Molina and Coronado and smoked a cigarette. Before he went outside, he noticed the door to the back bedroom was open. When he came back into the apartment, the door was closed and he could hear muffled voices, which he recognized as belonging to appellant and Alley. Carter went back out to the balcony and saw that Molina, Coronado, and Vargas had left the apartment and gone downstairs to an area near the parking lot and below the windows of the back bedroom. Carter went to join them.

Carter heard the music that had been playing in the apartment suddenly get much louder. He then heard Rice yelling “help” and “no.” He also heard a thumping sound that was rattling the windows but which was not caused by the music. Molina, who was standing next to Carter, warned: “You better not run.” But when Carter looked up and saw the maintenance man coming down the walkway, he panicked and ran away.

Coronado testified that earlier appellant had exited the back bedroom holding his shotgun and said, “This bitch is gonna have to die.” Shortly after appellant made this statement, Coronado asked Alley permission to leave the apartment to go home to change out of her work clothes. Alley told her she would have to come back to the apartment afterwards. Although she had a cell phone, Coronado testified she was too scared to call

911 or try to get help for Rice because Alley knew where she lived. After Coronado changed her clothes, she returned to Molina's apartment around 5:00 or 5:30 a.m. It was still dark outside. There were no sounds coming from the apartment. She saw Vargas lying on the couch, apparently asleep.

As Coronado walked to Molina's bedroom, she noticed the doorway to the back bedroom was open. Peering into the room, Coronado observed Rice lying face down on the floor. Rice's feet were handcuffed and it looked like she was wearing clothes. Coronado did not see anyone else in the bedroom.

Once inside Molina's bedroom, Coronado smoked drugs with Molina, appellant, defendant, and Alley. Coronado was unsure where Carter was at this time. A little later, Coronado saw Carter walk down the hallway, go into the back bedroom, and close the door. Coronado heard some noises and it sounded like Carter had turned the music back on. Appellant then left Molina's bedroom and joined Carter in the back bedroom. This was around 7:00 a.m. Coronado heard the music get louder. She then saw Vargas get up from the couch in the living room and go into the back bedroom and close the door. Finally, Alley also got up and went into the back bedroom and closed the door, leaving Coronado and Molina alone in Molina's bedroom. Coronado heard the four men talking but could not make out what they were saying because of the music playing in the back bedroom.

Coronado started talking to Molina about trying to see if they could talk the guys into letting them leave the apartment. After this, they went outside to smoke a cigarette. About five minutes later, they came back into the apartment and went back into Molina's bedroom. The door of the back bedroom was still closed and music was coming from the room. The door opened and all four men came out. Appellant and Alley told Molina and Coronado to keep an eye on Vargas and Carter and to make sure they did not leave. Molina, Coronado, and Carter sat in Molina's bedroom smoking drugs. Vargas returned

to the living room couch. Appellant and Alley went into the back bedroom. The door was closed and the music got a little bit louder.

Molina and Coronado went outside to smoke another cigarette. Coronado walked to the bottom of the stairs, and Molina stayed upstairs. A few minutes later, Carter came down the stairs, walked past Coronado, and left the apartment complex. Coronado never saw Carter again that morning.

Meanwhile, Coronado heard thumping sounds that were not the beat of the music. She assumed they were coming from the back bedroom. With each thump, the window from that room vibrated. She was not able to hear anything else at that time.

Coronado returned to the apartment. Appellant and Alley came out of the back bedroom and yelled at Coronado for letting Carter leave. Appellant, Molina, Alley, and Coronado then went into Molina's bedroom together. The four sat and talked about Carter. Appellant was upset and wanted to go look for him. The discussion lasted 10 or 15 minutes.

Appellant then left the apartment to look for Carter. Coronado sat in Molina's bedroom with Alley and Molina for another 20 minutes. Alley left and went into the back bedroom with Vargas and closed the door behind him. The music got a lot louder. Molina and Coronado went back outside the front door to smoke a cigarette. Coronado heard more thumping from the apartment and this time moaning and screaming like someone was in pain. The screaming went on for 15 or 20 minutes.

Coronado went downstairs. It was light by this time. She saw a maintenance man throwing some trash in the dumpster and a couple of neighbors sitting on the stairs smoking cigarettes. When she was at ground level in front of the two windows of Molina's apartment, she heard "screaming, thumping, like somebody was jumping up and down." The windows were rattling and the volume of the music had been turned up a lot higher. At this point in time, she had not seen appellant return to the apartment. The only people in the apartment were Alley, Vargas, and Rice. Eventually, Alley came out



of the apartment. He was sweaty, his face was red, and he complained of being hot.

Alley said “she doesn’t want to die” and “no matter what they do, she’s still breathing.”

Alley asked Molina about appellant and then went back into the apartment. When Alley was on the balcony with Coronado, she only heard the music coming from the back bedroom and no thumping or screaming. When Alley went back into the apartment, the screaming and thumping started again. The screaming finally stopped and the music was lowered. Vargas stayed in the room and Alley came back out and said something to Molina. After that, Alley said to Coronado that they needed to come up with a story to explain what they were doing that day.

In their testimony, Carter and Coronado went on to describe how the group later met at a motel and made efforts to hide Rice’s body and other evidence of the crimes. It was decided that the “girls” (i.e., Molina and Coronado) would return to the apartment and clean up and that the “guys” would go over later and move the body. Coronado was not happy with this arrangement and argued with Alley about it. Eventually she and Molina returned to the apartment around 3:00 or 4:00 p.m., after first purchasing cleaning supplies at a discount store.

When they walked inside the apartment, there was an overwhelming stink. Molina and Coronado got upset and started crying. They then hugged each other and went into the back bedroom where Rice’s body was lying on the floor. There was a green dishtowel over Rice’s face. Her right arm was in a fist by her side and the other arm was twisted behind her back. She was wearing jeans, which were lowered, exposing the pubic area. Coronado rolled Rice over to clean the carpet underneath her body. Coronado and Molina also wiped down counters and doorknobs in the apartment.

Early the next morning, Coronado drove back to Molina’s apartment and met up with the others. Appellant and another individual, named Craig Mills, were in the back bedroom trying to move a loveseat, which had Rice’s body on it. Rice’s body was wrapped in a sleeping bag and her feet were still cuffed. As the men were trying to move

the loveseat, appellant seemed “happy.” He said “it was turning him on to see [Rice] like that” and “[t]hat he wanted to fuck her.”

Rice’s body fell off the loveseat and appellant dragged it into the living room. Appellant and Mills wrapped the body in a futon mattress and tied it with electrical cords. They then took the body downstairs and put it in the bed of a blue pickup truck, which belonged to the construction company where appellant’s brother worked and was his brother’s work vehicle.

The group drove in separate vehicles to a rural area of Fresno, stopping first at a gas station to fill a five-gallon can with gas, which appellant indicated he was planning to use to burn Rice’s body. They eventually pulled into an almond orchard. Appellant, Vargas, and Mills retrieved shovels from the bed of the pickup truck and started to dig a hole. They had been digging five or 10 minutes, when Coronado saw a light in the distance and warned them she thought someone was coming. They fled, abandoning the pickup truck containing Rice’s body. The pickup was observed by a California Highway Patrol Officer on the morning of Sunday, June 11, 2006, and ordered towed to the impound lot where Rice’s body was discovered the following day.

Amanda Essman, a resident of Molina’s apartment complex, testified that in early June 2006, Rice described herself to Essman as appellant’s “hooker” and a “gangster” and made statements to the effect that she and appellant had committed crimes (“done dirt”) together. About 20 minutes after Rice made these statements, Essman confronted appellant. Appellant denied Rice’s statements and told Essman that Rice was “crazy.” Later, Rice called Essman a snitch and said she was going to kill her. Fearing for her personal safety, Essman spent the night at a hotel.

Another resident of the apartment complex, Terri Egger, testified that on Saturday, June 10, 2006, she overheard Molina arguing with appellant. Molina told appellant, “Don’t you bring that bitch to my place, don’t bring her over there” and “If I ever see that

bitch again, I'm going to beat her ass.” Appellant said something about using the person for prostitution and getting money for him by robbing people.

A few hours later, Egger met Rice for the first time by a trash dumpster at the apartment complex. Rice was not wearing any shoes and Egger invited her to her apartment to give her some clothing.

Later that evening, Molina told Egger that Rice was the person she had been arguing about with appellant earlier that day. Molina came to Egger's apartment around 9:00 or 10:00 p.m. Molina seemed nervous. She was limping and her knuckles were swollen and bruised. Egger asked Molina how she injured her hand. Molina responded that she was “made to fight some girl.” As to the limp, Molina said the girl's head hit her foot and she was going to have to get rid of her shoes.

Molina returned to Egger's apartment around midnight, seeming more “antsy” than before. Molina left some laundry at Egger's apartment and never returned for it.

Appellant's brother, Richard Juarez, testified that he knew his brother had several girlfriends. Juarez had met Rice in the past. The last time was about two weeks before she died. Appellant told Juarez that Rice “had stuff on him.”

### ***The Gang Expert's Testimony***

Detective Anthony Gates testified as the prosecution's gang expert. He had been a member of the Fresno Police Department for two and a half years, and had previously served as a California Highway Patrol Officer for nine and a half years. Detective Gates had also been part of the Multi-Agency Gang Enforcement Consortium (MAGEC) for the past seven years and had been assigned to that unit as a detective for the past four years.

Detective Gates testified that the Bulldog gang is the largest gang in the greater Fresno area with approximately 4000 validated members. In his work, he has had approximately 800 to 1000 contacts with Bulldog gang members. Bulldogs identify with the color red and anything related to the Fresno State athletic department such as the

school's bulldog mascot. The Bulldog gang's primary activities include murder, assaults, and witness intimidation.

According to Detective Gates, respect is everything in the gang culture. Respect comes from fear and intimidation. Gang members gain respect by committing acts of violence against rival gang members and non-gang members. Fear and intimidation make it easier for gangs to commit crimes within a neighborhood because people are reluctant to report crimes to the police.

It is beneficial to a gang member to commit a violent act on an individual in front of other members of his or her gang. It bolsters the gang member's reputation within the gang by showing the gang member is "down with the cause" and not afraid to commit crimes. Committing violent crimes in front of other gang members also benefits the gang itself because it "cements that feeling of invincibility and ... cements that into the minds of the other gang members that, hey, we are ... a bunch of bad dudes, bad gals type-of-thing." When an individual Bulldog commits violent acts, it benefits the Bulldog gang in general because "they've now proven themselves, in a sense, to each other, and to rivals, community members and law enforcement."

A snitch is someone who cooperates with the police or tells on someone else in a way that may potentially get them in trouble. Bulldogs view snitches as the "[l]owest of the low." Snitches are perceived as posing a danger to the self-preservation of both individual gang members and the gang itself.

Presented with a series of hypothetical scenarios based on the facts and circumstances in this case, Detective Gates opined, as to each defendant, that their activities benefited, were directed by, and were in association with the Bulldog gang. Among other things, Detective Gates testified that by acting in the presence of other Bulldog gang members, defendants' activities benefited the gang because "now each one of them can attest – or testify to the fact that that person is willing to commit such violent acts, again, garnishing the fear, garnishing the reputation."

It also benefited the gang when one of its members was successfully able to direct others, including non-Bulldog members, to assist him in carrying out his crimes. Thus, Detective Gates answered in the affirmative when asked, “The individual who was using the 16-year-old, as a prostitute, did his actions in having that snitch raped and murdered, is that furthering the activities of the Bulldog gang.” The gang expert explained: “[a]gain, you’re talking about a group that thrives on fear and intimidation, and you get fear and intimidation by committing violent acts. And in that culture, the more fear and intimidation and respect you have, the easier it is to be a gang.”

## **DISCUSSION**

### ***I. Disclosure of Juror Identifying Information***

Appellant contends the trial court abused its discretion when it denied his motion for disclosure of confidential juror identifying information so he could investigate possible misconduct by the jury foreperson. We disagree.

#### ***A. Background***

After the trial, the defense investigator spoke with Juror No. 3, who executed a declaration on which appellant based his motion for disclosure of juror information.

Juror No. 3’s declaration stated in relevant part:

“During jury deliberations, [the] Foreman [Juror No. 10<sup>3</sup>] read aloud the beginning of the instruction on conspiracy, up to and including the listed ‘overt acts.’ When he finished reading the first page regarding overt acts, he stated words to the effect, ‘That’s it. We have a conspiracy.’ Then jurors began discussing conspiracy. While that discussion was going on, I read the remaining portion of the instruction to myself. When I finished reading it to myself, I said we should read and discuss the remaining portions of the instruction, which included definitions of conspiracy as it applied to the evidence and charges. I separately engaged several jurors

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<sup>3</sup> In his opening brief, appellant identifies the jury foreperson incorrectly as Juror No. 12.

about the remaining parts of that instruction. When I questioned [the] Foreman ... in the presence of all other jurors about the remaining portion of the conspiracy instruction, he responded, 'We're not going to discuss that.'"

At the initial hearing on appellant's motion, the trial court noted the declaration of Juror No. 3 was ambiguous because it was unclear whether the quoted discussion with the foreperson occurred before or after the jury had rendered verdicts for appellant. In this regard, the court stated:

"What I don't have in this declaration that could have easily--easily been obtained, is that, you know, at what point did this occur? [I]t's perhaps Alley and Vargas who have this argument that conspiracy wasn't discussed thoroughly and fully deliberated as to their charges. But it's clear--it seems to be clear, that whatever theory Mr. Lopez was convicted upon, was discussed. All jurors confirmed their--that that was their verdict. [¶] ... [¶] [T]he declaration of Juror Number Three doesn't say--it's just plain, it doesn't say when, as to whom they were deliberating about as to that instruction; is it as to just generally, you know--it would be so easy just to bring that person in here and just say, 'yeah, what were you talking about then? Had you completed deliberations as to Mr. Lopez already?' ... That's the question that should have been posed to him, instead of giving me this vague declaration from him. Because then if he said, 'no,' if it's as to all of them, then you stand in a much better position. But it is just--what--where it puts me is that it's only as to the discussion as to the hung counts and the--and the defendants that those apply to. [¶] ... [¶]

"... Won't it be a waste of time, though, if I allow you to contact the jurors ... and then we bring number three in here for that evidentiary hearing, and then I ask the question, 'Now, as to what you said in paragraph three, now, had you completed deliberations? Or what was the nature of deliberations, how did you go about doing it?' And he says, 'Well, we--we first looked to all the instructions and then we went for each defendant separately.' 'Okay. So when you voted and you deliberated as to Mr. Lopez, was the confusion issue or did Mr. Foreperson say we're not going to discuss that?' 'Oh, no, no, no, no. Mr. Lopez, there was no problems, we all voted and we gave our verdicts.' 'So the only problems you had were as to Mr. Alley and Mr. Vargas and Miss Molina?' 'Yes.' [¶] We're going to go through all this work for something like that."

The trial court then continued the hearing on appellant's motion, "[s]olely for the purpose of the clarification of Juror Number Three's declaration as to when that occurred."

The prosecutor subsequently obtained a second declaration from Juror No. 3. In his second declaration, Juror No. 3 stated that the conversation with the foreperson occurred after "the jury had already arrived at our verdicts, on all counts, as to defendant Joseph Lopez, to the best of my recollection."

At the continued hearing, the trial court found that appellant had not made a prima facie showing that would justify the release of juror identifying information because Juror No. 3's second declaration established "the statement of the foreman had occurred after verdicts were already rendered on [appellant]." Based on this conclusion, the court inferred that "whatever problems they had were related as to those defendants upon whom they were hung, couldn't decide on the verdicts[.]"

### ***B. Analysis***

"A criminal defendant has neither a guaranty of posttrial access to jurors nor a right to question them about their guilt or penalty verdict." (*People v. Cox* (1991) 53 Cal.3d 618, 698-699, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) "[S]trong public policies protect discharged jurors from improperly intrusive conduct in all cases.' [Citations.] The uncontrolled invasion of juror privacy following completion of service on a jury is, moreover, a substantial threat to the administration of justice. [Citations.] These concerns, however, must be balanced with the equally weighty public policy that criminal defendants are entitled to jury verdicts untainted by prejudicial juror misconduct. [Citations.]" (*Townsel v. Superior Court* (1999) 20 Cal. 4th 1084, 1092.)

Sections 206 and 237 of the Code of Civil Procedure govern petitions for disclosure of juror identifying information, which information is automatically sealed upon the recording of a verdict in a criminal case. (Code Civ. Proc., § 237, subd. (a)(2).)

Code of Civil Procedure section 206 authorizes a criminal defendant to petition pursuant to Code of Civil Procedure section 237 for access to personal juror identifying information when the sealed information is “necessary for the defendant to communicate with jurors for the purpose of developing a motion for new trial or any other lawful purpose.” (Code Civ. Proc., § 206, subd. (g).) Code of Civil Procedure section 237 provides that the petition must be supported by a declaration that includes facts sufficient to establish good cause for the release of the jury information. If the court determines that the petition and supporting declaration establish a prima facie showing of good cause for release of the juror information, the court must set a hearing, unless the record establishes a compelling interest against disclosure. (Code Civ. Proc., § 237, subds. (b), (c), (d).) If a hearing is set, then the trial court shall give the former juror or jurors notice they may appear in person or in writing to protest the granting of the petition. (Code Civ. Proc., § 237, subd. (c).) A former juror’s protest shall be sustained if, in the court’s discretion, “the petitioner fails to show good cause, the record establishes the presence of a compelling interest against disclosure..., or the juror is unwilling to be contacted by the petitioner.” (Code Civ. Proc., § 237, subd. (d).) The trial court’s ruling is reviewed for abuse of discretion. (*People v. Jones* (1998) 17 Cal.4th 279, 317.)

To demonstrate good cause, a defendant must set forth “a sufficient showing to support a reasonable belief that jury misconduct occurred.” (*People v. Rhodes* (1989) 212 Cal.App.3d 541, 552.) The misconduct alleged must be “‘of such a character as is likely to have influenced the verdict improperly.’ [Citation.]” (*People v. Jefflo* (1998) 63 Cal.App.4th 1314, 1322.) Good cause does not exist where the allegations of jury misconduct are speculative, conclusory, vague, or unsupported. (*People v. Wilson* (1996) 43 Cal.App.4th 839, 852; *People v. Rhodes, supra*, at pp. 553-554.) Even where good cause exists, juror identifying information may not be had if the record establishes a compelling interest against disclosure to protect the jurors from threats. (Code Civ. Proc., § 237, subd. (b).)



Here, the trial court did not abuse its discretion in denying appellant's motion for disclosure of juror identifying information. While Juror No 3's declarations establish a possible ground for misconduct, the testimony also established that the verdicts for appellant were arrived at before any possible misconduct occurred. In his second declaration, Juror No. 3 stated unequivocally that the discussion with the foreperson occurred after the jury had arrived at verdicts for appellant. Therefore, the possible misconduct could not have influenced appellant's verdicts improperly.

Focusing on the qualification ("to the best of my recollection") in Juror No. 3.'s second declaration, appellant contends the prosecution failed to rebut his prima facie showing of misconduct. In rejecting a similar argument, the trial court observed:

"I understand how the defense wants to see it, how they see it ... but no one ever asked him the question that I wanted asked, 'when did that occur.' And it was asked finally by the People, and ... Juror Number Three finally tells when it occurred. *Even if he says, 'to the best of my recollection,' that's good enough, that's the best.* And I know his ... initial statement ... went through a few edits, and--you just can't cherry pick what you want from Juror Number Three; and that's what I see going on, is just cherry picking as to what he says, and then making it fit your version of the facts or what you believe to be the facts." (Italics added.)

We agree with the trial court, and conclude that Juror No. 3's qualification did not render his second declaration equivocal or otherwise provide grounds for discrediting his statement regarding the timing of the discussion with the foreperson.

Appellant goes on to argue that assuming the discussion occurred after the jury reached its verdicts against him, the jury necessarily failed to consider the charges properly and follow the law as instructed. This is so, he argues, because "conspiracy was an essential theory for the state because it was the only basis for admitting the hearsay statements of the uncharged conspirators in order to establish the elements of the charged crimes. (Evid. Code, § 1223.)"

The problem with appellant's argument is that it assumes the discussion with the foreperson cited by Juror No. 3 was the first and only time the jurors discussed the conspiracy instructions or the existence of a conspiracy during deliberations. But there is no evidence supporting this assumption. Juror No. 3's declarations are silent as to whether the jury discussed the conspiracy instructions prior to reaching its verdicts for appellant or whether Juror No. 3's discussion with the foreperson was the first time the issue came up during deliberations.

Furthermore, several conspiracy instructions were given to the jury (i.e., Judicial Council of Cal. Crim. Jury Instns. (2008), CALCRIM Nos. 416-418). But only one of these instructions was mentioned by Juror No. 3. Presumably the instruction he referenced was CALCRIM No. 416, as this was the only two-page conspiracy instruction listing overt acts of the uncharged conspiracy. CALCRIM No. 418 was the instruction concerning the hearsay exception for statements by uncharged coconspirators.<sup>4</sup> Appellant speculates that the jury did not properly assess the evidence in light of CALCRIM No. 418. However, speculation that jury misconduct occurred, without more, is insufficient to establish good cause for the release juror information.

Appellant further argues his trial counsel rendered ineffective assistance of counsel by failing to object on due process grounds to the trial court's decision not to consider the transcript of Juror No. 3's interview with the defense investigator upon

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<sup>4</sup> CALCRIM No. 418 stated, in part: "In deciding whether the People have proved that the defendants committed any of the crimes charged, you may not consider any statement made out of court by Joseph Lopez, Rodger Alley, Elbert Vargas, or Michelle Molina unless the People have proved by a preponderance of the evidence that: [¶] 1. Some evidence other than the statement itself establishes that a conspiracy to commit a crime existed when the statement was made; [¶] Joseph Lopez, Rodger Alley, Elbert Vargas, or Michelle Molina were members of and participating in the conspiracy when they made the statement; [¶] 3. Joseph Lopez, Rodger Alley, Elbert Vargas, or Michelle Molina made the statement in order to further the goal of the conspiracy; [¶] AND [¶] 4. The statement was made before or during the time that the defendants were participating in the conspiracy."

which Juror No. 3's first declaration was based. This transcript was submitted by the defense in response to Juror No. 3's second declaration. The court declined to consider either this transcript or the People's transcript of the prosecutor's interview of Juror No. 3, upon which his second declaration was based. The trial court found the transcripts were not competent evidence because they were unsigned and not part of Juror No. 3's declarations. Consequently, the court limited its consideration to the statements in Juror No. 3's declarations, except for statements it found inadmissible under Evidence Code 1150.

We reject appellant's ineffective assistance claim because he has failed to demonstrate any prejudice; i.e., that a reasonable probability exists that, but for counsel's alleged failings, the result would have been more favorable to appellant. (*Strickland v. Washington* (1984) 466 U.S. 668, 697-688; *People v. Waidla* (2000) 22 Cal.4th 690, 718.) Contrary to appellant's suggestion, the transcript of Juror No. 3's interview with the defense investigator fails to rebut the juror's second declaration stating the discussion with the foreperson occurred after the jury had already arrived at its verdicts for appellant. If anything, the transcript substantiates the second declaration, as several of Juror No. 3's answers suggest the complained-of discussion with the foreperson arose in the context of the jury's deliberations concerning defendants Alley and Vargas.<sup>5</sup>

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<sup>5</sup> In relevant part, the defense investigator questioned Juror No. 3 as follows: "Q. But what about Page 2 [of the conspiracy instruction] you talked about? [¶] A. Page 2 was what I was reading and he told the rest of the jury, 'No, we're not going to look at that.' [¶] Q. But didn't you tell me on the phone that there was one other juror that mentioned the same thing, a young African-American girl? [¶] A. No, she didn't mention anything with that. But she was-- there are a few people that were not--I don't believe they were real happy with the foreman, because it appeared to us that the foreman was trying to push us into entering guilty pleas. [¶] Q. Can you give an example? [¶] A. Well, he wanted to make a conspiracy theory out of the case and wasn't interested in anything that would tell you that it wasn't a conspiracy. He wanted to determine for everybody in the room that it was a conspiracy. [¶] ... [¶] Q. And this is what he is trying to push? [¶] A. I believe that is what he was trying to push. [¶] Q. But it didn't work? [¶] A. It didn't work for me. [¶] Q. It didn't work for everybody because he-- [¶] A. It didn't work for everybody. [¶] Q. Do you have anything else you want to add to this? [¶] A.

On this record, we conclude the trial court did not abuse its discretion when it denied appellant's motion for the disclosure of confidential juror identifying information.

## ***II. Confusing Jury Instructions***

Appellant contends the jury instructions in this case were so confusing they violated his constitutional rights to due process and a fair trial. The People argue the issue was forfeited by appellant's failure to raise it below. We need not decide the forfeiture issue. Assuming appellant's challenge is properly before us, he has failed to demonstrate any instructional error.

Appellant does not dispute that the instructions given in this case correctly stated the law. He argues that, because this was a complex case with multiple defendants and theories of liability the instructions should have included some type of "roadmap" explaining "the relationship between legal theories of murder, malice and felony murder," "why felony murder is both a legal theory of murder and a form of derivative liability," "why aiding and abetting and conspiracy are distinct forms of derivative liability," "why aiding and abetting and conspiracy apply not only to derivative liability but also evidentiary determinations." He concludes: "Without some guidance, the lay jury in this case--and, indeed, in any complex case--has no roadmap to guide the jurors. The jurors cannot reach a verdict on sound legal grounds."

Appellant cites no authority for his assertion that in a complex criminal case the trial court is required to provide a roadmap or overview explaining the rationale behind particular jury instructions or the relationship between theories of liability and rules of

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No. I mean, to me--no. No. You know, nothing is perfect. You want to get the best--*you want to get the honest, best possible solution to what you can. And I believe on two of the defendants we did. And I'm a little confused about what happened with Vargas and Alley.* [¶] **Q.** Can you explain that? [¶] **A.** Well, it seemed like--it seemed like that--I don't know *because that's where we got into the issue of the conspiracy. The next thing I know, the jury foreman is saying we're on.*" (Italics added.)

evidence set forth in the instructions. “The trial court is required to instruct the jury on the points of law applicable to the case. [Citation.] *No particular form is required* as long as the instructions are complete and correctly state the law.” (*People v. Tatman* (1993) 20 Cal.App.4th 1, 10, italics added.) Moreover, we must presume that jurors are intelligent and capable of understanding and correlating all jury instructions given (*People v. Kegler* (1987) 197 Cal.App.3d 72, 80), and that they follow those instructions (*People v. Horton* (1995) 11 Cal.4th 1068, 1121).

Appellant also fails to demonstrate the instructions were so confusing that they violated his due process and fair trial rights. When it is argued that an instruction is so vague and confusing as to violate fundamental ideas of fairness, “we inquire ‘whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way’ that violates the Constitution.” (*Estelle v. McGuire* (1991) 502 U.S. 62, 72; accord, *People v. Holt* (1997) 15 Cal.4th 619, 677.)

As the People note, there was no evidence of jury confusion with respect to the charges against appellant. Just before the verdicts were read, the trial court received a note that the jury was unable to reach verdicts on all counts as to two of the defendants. When the court brought the jury in and asked whether there was anything the court could do to assist the jury in reaching verdicts, Juror No. 12 expressed that he thought some of the instructions were “a little confusing” and “conflicting one another.” After the court explained it could not change the instructions, Juror No. 12 agreed with the other jurors that there was nothing more the court could do to help resolve their deadlock. The court then collected the verdict forms and read the verdicts, which revealed the jury had been unable to reach verdicts with respect to defendants Alley and Vargas on the murder

count.<sup>6</sup> After reading the verdicts, the court polled the jurors, and each juror individually affirmed that the verdicts were his or her own.

It is clear from the timing of his statements that any confusion exhibited by Juror No. 12 arose in the context of the jury's deliberations on the murder count with respect to Alley and Vargas, and that the jury had already completed its deliberations with respect to appellant and defendant Molina. There is no indication the jury was confused or misapplied any of the instructions as to appellant.

In his reply brief, appellant asserts that "even if one does not rely on Juror No. 12's statement, the actual verdict in this case demonstrates the jurors were confused." He then suggests that the fact he was the only defendant convicted of first degree murder, even though the evidence indicated he was not in the apartment at the precise time of Rice's death, somehow demonstrates the jury was confused by the instructions. In view of the fact appellant does not challenge the sufficiency of the evidence supporting his conviction, and that the jury was correctly instructed on the various theories under which it could find appellant guilty of Rice's murder, we find no evidence of confusion in the jury's verdict.

Hearkening back to his first argument on appeal, appellant goes on to assert: "The question remains open whether the jury convicted appellant as an aider and abettor based on accomplice testimony alone, without understanding the need to first find an uncharged conspiracy to make the hearsay statements of Molina, Alley, and Vargas admissible." Again, appellant bases his assertion on unsupported speculation that the jury did not properly consider the instruction on the hearsay exception for statements by uncharged coconspirators. Assuming, as we must, the jury understood and followed the instructions on this and other matters relevant to appellant's guilt, we reject appellant's assertion.

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<sup>6</sup> The jury actually found Vargas not guilty of murder but was unable to reach a verdict on the lesser offenses of murder.

In short, appellant fails to demonstrate a reasonable probability the jury applied the instructions in a manner that violated the constitution and we therefore reject his contention the instructions in this case were so confusing they violated his right to due process and a fair trial.

### ***III. Sufficiency of the Evidence of the Gang Enhancements***

Lastly, appellant contends there was insufficient evidence to support the gang enhancements and special circumstance. We disagree.

We review a jury's findings on gang enhancements for substantial evidence. We view the evidence in the light most favorable to the judgment and do not resolve evidentiary conflicts or credibility issues. We will not reverse the jury's findings unless ““upon no hypothesis whatever is there sufficient substantial evidence to support” the jury's verdict. [Citation.]” (*People v. Zamudio* (2008) 43 Cal.4th 327, 357; *People v. Villalobos* (2006) 145 Cal.App.4th 310, 321-322.)

The gang special circumstance required proof appellant “intentionally killed” Courtney Rice while he was “an active participant in a criminal street gang ... and the murder was carried out to further the activities of the ... gang.” (§ 190.2, subd. (a)(22).) The gang enhancements required proof appellant's crimes were committed “for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members[.]” (§ 186.22, subd. (b)(1).)

As noted above, the parties stipulated the defendants were all active members of the Bulldogs criminal street gang. In challenging the sufficiency of the evidence to support the gang enhancements and the gang special circumstance, appellant focuses on the requirement that the crimes be carried out in furtherance of gang activities. Appellant contends the evidence shows his crimes against Rice were personally motivated, not in furtherance of the gang, and the prosecution presented no evidence, only speculation by the gang expert, that the crimes were gang related.

In support of his contention, appellant relies heavily on *People v. Ramon* (2009) 175 Cal.App.4th 843 (*Ramon*), in which this court found the expert's opinion as to gang-related purpose was merely speculative. *Ramon*, however, is distinguishable. There, the gang expert rendered his opinion based solely on the facts that the two defendants were found in a stolen car with an unregistered handgun, driving in their gang's territory. As such, the expert opined, the defendants had obtained the tools with which they might commit other gang-related crimes in the future. (*Id.* at pp. 847, 848, 853.)

Here, in contrast, there was no speculation about future crimes to benefit the gang. The prosecution presented substantial evidence that appellant committed the offenses with other Bulldog gang members against Rice because she was regarded as a snitch. The gang expert gave testimony to the effect that gangs deal harshly with snitches and the types of crimes committed in this case would benefit the gang by promoting gang solidarity. (See *People v. Montes* (2003) 31 Cal.4th 350, 361 [“Gang-related crimes pose a unique threat to the public because of gang members’ organization and solidarity”].) In this regard, the expert testified that gang members benefit the gang by committing violent acts in front of one another because it “cements that feeling of invincibility” and proves to one another that each member is “down with the cause.” The fact appellant might benefit personally from silencing a snitch that has knowledge of his criminal activities does not preclude a finding that his crimes, committed with other gang members, benefited and furthered the activities of his gang.

The other cases appellant cites are also inapposite and do not require extended discussion. (See *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1195, 1199 [insufficient evidence of gang enhancement where only evidence of gang-related intent was single perpetrator's gang membership]; see also *People v. Killebrew* (2002) 103 Cal.App.4th 644, 657-658 [gang expert cannot testify as to defendant's specific intent in commission of crime].)



We conclude substantial evidence supports the gang enhancements and gang special circumstance.

**DISPOSITION**

The judgment is affirmed.

WE CONCUR:

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HILL, J.

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DAWSON, Acting P.J.

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KANE, J.